

How we make decisions about and conduct prosecutions

Operational Policy (OP 18)

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Introduction

As a risk-based regulator we prioritise taking action to prevent harm from occurring across the maritime domain.

When harm has occurred, or an unsafe situation or non-compliance is identified, we will first require that corrective action be taken to address the situation. Following the necessary corrective action being substantively underway, we will consider if it is proportionate in the circumstances to hold a person to account using one of our enforcement tools, which includes prosecution.

This policy sets out when and how we decide to prosecute. It includes sentencing and appeals.

This policy should be read alongside our policies:

- When and how we use our corrective and enforcement tools under the Maritime Transport Act 1994 (MTA) and the Health and Safety at Work Act 2015 (HSWA) (OP 12)
- When we consider other sentencing options (OP 25)
- How we support people that are victims of the events we respond to (OP 16).

This policy applies to all prosecutions we take under our legislation

Our power to prosecute is primarily found in the Maritime Transport Act 1994 (MTA) and the Health and Safety at Work Act 2015 (HSWA).

We may also, when appropriate, prosecute offences under other legislation, such as the Maritime Security Act 2004.

Our approach to prosecution

Prosecution is one of the tools we have available in our enforcement toolkit to prevent harm or further harm from occurring across the maritime domain.

We prosecute to:

- hold people to account through a legal process
- incentivise enduring behaviour change, and
- share broader insights that have a sector wide or public interest benefit.

At all stages of a prosecution, we will:

- treat victims with courtesy, compassion, and respect for their dignity and privacy
- be mindful of the effect the offending we are prosecuting has on victims
- maintain a high standard of professional and ethical conduct in line with the Maritime New Zealand (Maritime NZ) Code of Conduct and our Service Charter.

How we decide to prosecute

We will prosecute where, after any necessary corrective action is substantively underway, we are satisfied that:

- in the circumstances it is proportionate and in the public interest to prosecute, and
- the Evidential Sufficiency Test has been met.

The Director of Maritime NZ (the Director) or another person with the appropriate delegation makes the decision to prosecute. Any decision to prosecute considers advice from Maritime NZ's Regulatory Decision Advisory Panel on the extent to which prosecution in the circumstances is proportionate and in the public interest. Legal advice is also received on evidential sufficiency.

Any prosecution decision we make is informed by:

- our regulatory approach
- the Solicitor-General's Prosecution Guidelines (the Prosecution Guidelines), and
- the facts of the incident or non-compliance.

What we mean by proportionate and in the public interest

Proportionate and in the public interest means that, in the circumstances, after considering the range of our enforcement tools, we choose one that will most effectively hold people to account, and incentivise enduring behaviour change.

To decide if prosecution is proportionate and in the public interest we consider a range of factors. The most important are:

- an incident of serious harm or risk of serious harm to people, property or the environment has occurred
- the type of behaviour of the person, operator or person conducting a business or undertaking (PCBU) that led to the serious harm or risk of serious harm, including whether that behaviour was reckless, wilful or negligent
- the person, operator or PCBU knew or ought to have known how the risk factors that led to the serious harm or risk of serious harm should be controlled, but failed to implement controls in a timely manner.

Other factors we consider important to our decision that prosecution is proportionate and in the public interest are:

- the safety and compliance record of the person, operator or PCBU, both positive and negative, including whether or not there has been a history of complying with corrective action in a timely way
- the combination of breaches involved, including whether there is a singular breach of significance
- whether the person, operator or PCBU could have influenced the circumstances that gave rise to the non-compliance where the non-compliance arose due to an emergency
- if there was an element of corruption, coercion, or an abuse of trust by a person in a position of authority, including an abuse of their position
- if the likely sentence imposed would be more than minor
- if there is likely to be a sector wide impact and/or public interest from the prosecution, and
- it relates to a known critical risk area being addressed through one of our Harm Prevention Programmes.

Not every factor has to be present for us to decide it is proportionate and in the public interest to prosecute. In making a decision however, we will take into account the number and seriousness of the factors involved.

Before making a decision to prosecute, we will also consider the impacts on, and views, of any victims. More information on how we support victims can be found in our policy “How we support people that are victims of events we respond to (OP 16).

When a small or tightly held operator or PCBU is involved, it is proportionate and the Evidential Sufficiency Test has been met to prosecute several parties within the PCBU in different ways (for example PCBU, officer, skipper, worker), we will:

- consider the extent of the roles and their culpability, and
- only prosecute the most appropriate charges.

We will usually decide, for example, between charging either a small/tightly held PCBU or an officer who owns the PCBU where the charges concern the same key issues. This is because it is not normally in the public interest to charge both of these parties given it will in effect charge the same individual twice.

If we decide it is proportionate and in the public interest to prosecute, we apply the Evidential Sufficiency Test.

Applying the Evidential Sufficiency Test

The Evidential Sufficiency Test must be satisfied

When we are initially satisfied a decision to prosecute is proportionate and in the public interest, we must be satisfied that the evidence, which can be shown in court is sufficient to provide a reasonable prospect of conviction.

For the Evidential Sufficiency Test we consider:

- where there may be an obvious defence raised, whether the evidence satisfies that defence
- if the evidence is available, admissible, credible, and reliable, and
- how a court might view particular evidence based on previous experience.

Once the Evidential Sufficiency Test has been completed, before making a final decision to prosecute we will ensure it remains proportionate and in the public interest to do so.

Management and oversight of prosecutions

If we decide to prosecute, we will inform the Solicitor-General of any matter relating to the prosecution that:

- is of general public or legal importance, or
- which gives rise to substantial or new forms of legal risk.

We must have consent from the Attorney-General before laying charges under Parts 19 to 28 of the MTA where:

- we are looking to lay charges against a person (not a corporation) who is not a New Zealand citizen or resident in New Zealand, and
- the acts allegedly done have occurred beyond the territorial sea of New Zealand.

If we are considering charges under legislation regulated by another agency, we will inform the relevant agency before filing charges.

Generally, Maritime NZ solicitors will be responsible for managing the conduct of the prosecution.

The Crown Solicitor, when instructed:

- reviews the file
- recommends charges, and
- prepares the charging documents.

The officer in charge is responsible for filing the charges.

For non-Crown prosecutions, we may conduct the prosecution in-house or work with the Crown Solicitor if they are conducting the prosecution on our behalf.

We are not responsible for managing Crown prosecutions

Crown Law are responsible for all Crown prosecutions. Our role in these cases is to provide any assistance required by Crown Law.

The decision to prosecute is kept under review

Throughout the prosecution process, we will keep our decision to prosecute under review to make sure it remains the appropriate course of action, and that the charges are correct.

We will not continue with the prosecution if at any time we consider that it is no longer proportionate and in the public interest, or the Evidential Sufficiency Test is no longer met.

This may occur if:

- we receive further information or evidence that contradicts existing evidence or weakens the prosecution case, or
- there is a material change in circumstances that affects the factors we considered as part of the proportionate and Public Interest Test.

If we receive a request for a review of the prosecution from the defendant, we use our judgement on whether the request calls for a reconsideration of the prosecution. When deciding if the request should result in a review of the prosecution, we will consider:

- if any new evidence or information has been provided by the defence
- whether any information on a material change in circumstances has been provided
- whether a plea arrangement has been proposed, and/or
- if an enforceable undertaking has been proposed.

If we decide to not continue with a prosecution, we may reconsider the use of other corrective and enforcement tools, such as a project order if we determine that action still needs to be taken.

During the course of regularly reviewing our decision to prosecute, we also consider whether an appropriate plea arrangement can be reached with a defendant.

We may agree to or propose a plea arrangement

Plea arrangements are agreements between the prosecutor and the defendant that can efficiently and effectively progress a prosecution. In plea arrangements, the defendant agrees to plead guilty if the prosecutor agrees to:

- reduce the charge to a lesser offence
- withdraw or offer no evidence on other charges
- not file, withdraw or offer no evidence:
 - on charges against another person or persons, or
 - in exchange for a suspect giving evidence in a trial against other defendants involved in the same set of facts
- combine multiple charges to a single charge
- amend the content in the summary of facts that will be put before the court.

Agreeing to plea arrangements can achieve an outcome that reflects the essential criminal nature of the offending and preventing harm or further harm while:

- providing victims with certainty of an outcome and reducing stress and trauma from having to go to trial
- allowing for a quicker outcome than if a trial is required
- saving resources and the cost of a trial for the defendant, prosecutor, and court if a trial is not required.

Defendants may make a proposal for a plea arrangement

We do not need to agree to a plea arrangement proposed by a defendant, but we may do so after considering:

- the views of victims
- the seriousness of the conduct
- whether the available evidence supports the proposal
- whether the proposal reaches an appropriate outcome without the need for a trial.

Maritime NZ may propose a plea arrangement

We may make a plea proposal to a defendant where a guilty plea to an amended or lesser charge sufficiently captures the defendant's culpability and prevent harm or further harm from occurring without the need for a trial.

When considering making a plea proposal we take into account:

- if the available evidence supports the charge to which the defendant will plead guilty
- whether the proposal adequately reflects the criminality of the conduct
- whether the proposal provides an adequate basis for an appropriate sentence
- the public interest in a plea arrangement, including whether:
 - any voluntary reparations or other means of making amends have been offered by the defendant (provided this is not conditional on withdrawing or offering no evidence on charges)
 - the proposal meets the seriousness of the offending and will prevent harm or further harm from occurring
 - the potential outcome reflects the views of victims, and
 - the need for deterrence and safety needs for the sector.

A plea arrangement may be withdrawn

If we become aware that the facts of the case are significantly different to those we understood at the time of entering into a plea arrangement, we can withdraw from the arrangement.

Sentencing

It is the role of the court to sentence defendants upon conviction for an offence. On a successful prosecution, we will make submissions to the court for sentencing to assist the court to determine an appropriate sentence.

Our submission contains information we are aware of as prosecutors, including on the basis of all proven or agreed facts.

To assist the court, we:

- make reference to relevant authorities and guideline judgements
- include any statutory presumptions for sentence and our assessment of factors relevant to whether or not the presumption is displaced
- set out relevant aggravating factors such as previous convictions and breaches, weighing these against:
 - time that has passed since the previous conviction or breach

- whether the previous convictions or breaches are for different matters, and
- the seriousness of previous convictions or breaches
- set out relevant mitigating factors personal to the defendant (limited to what we are aware of), including positive compliance history
- include information on the impact of the offending on victims
- include our position on the available sentencing range, and
- include the amount of any reparations and other options such as project orders, and or adverse publicity orders etc (including costs) sought.

We may agree certain matters of sentencing submissions with a defendant. If this occurs, it is recognition that we consider that aspect of sentencing to be appropriate, but it does not replace the court's ultimate conclusion on the sentence which is exclusively a decision for the court.

We can recover costs associated with prosecution

We can seek to recover costs associate with a prosecution, including under:

- section 4(1) of the Cost in Criminal Cases Act 1967 (CCCA), for all prosecutions, or
- section 152 of HSWA for HSWA prosecutions only.

Prosecution is subject to appeal

Defendants have rights to appeal various judicial decisions, conviction and sentence.

Defendants may also seek a judicial review of certain decisions.

We have limited appeal rights. Any appeal we bring must be agreed by the Director and approved by the Solicitor-General.

All appeals are taken on their facts.

Generally, we are responsible for arranging and funding representation for appeals. If an appeal is related to a Crown prosecution, appeals are conducted and funded by Crown Law.

We assess whether an appeal by the defendant can be defended

If a defendant appeals, we assess whether there is a reasonable basis for defending the decision by:

- reviewing the merits of the appeal
- considering what can be said in answer to the appeal, and
- the significance of issues raised in the context of the appeal as a whole.

We will be mindful of the views and interests of victims in our appeal response.

We will only appeal where there is a public interest in doing so

There are a number of different appeals that prosecuting agencies can take, and any appeal we take must be in the public interest.

When deciding whether to appeal a decision or sentence, we consider (subject also to Solicitor-General approval):

- the likelihood of success
- whether a sentence is manifestly inadequate and does not adequately reflect the level of offending
- if there is an identifiable error or principle of law that applies beyond the facts of the case is unfair with regard to sentences imposed on co-offenders or with regard to similar cases
- if the ruling is concerned with a point of law and not whether the evidence was sufficient in the case
- whether there is a question of law and if the answer to the question of law will have an impact on the outcome or be significant in other cases.

Further information

This policy should be read alongside other Maritime NZ policies, which can be found on our website including:

- When and how we use our corrective and enforcement tools under the Maritime Transport Act 1994 (MTA) and the Health and Safety at Work Act 2015 (HSWA) (OP 12)
- When we consider other sentencing options (OP 25)
- How we support people who are victims of events we respond to (OP 16)
- How we regulate health and safety issues relating to both the Maritime Transport Act 1994 and the Health and Safety at Work Act 2015 (PS 06).

Also see our website for further information on:

- our Privacy Statement
- our Service Charter.

Legislative basis for this policy

The following legislation, and their related regulations and rules support this policy:

- Cost in Criminal Cases Act 1967
- Criminal Disclosure Act 2008
- Criminal Procedure Act 2011
- Crown Entities Act 2004
- Evidence Act 2006

- Hazardous Substances and New Organisms Act 1996
- Health and Safety at Work Act 2015
- Maritime Security Act 2004
- Maritime Transport Act 1994
- Official Information Act 1982
- Privacy Act 2020
- Schedule 2 of the Judicature Act 1908
- Sentencing Act 2002
- Ship Registration Act 1992.
- Submarine Cables and Pipelines Protection Act 1996
- Victims' Rights Act 2002.

The Prosecution Guidelines have informed this policy.

Key terms

Admissible evidence	for the purposes of this policy, means evidence which is reasonably expected to be able to be used in court proceedings.
Available evidence	for the purposes of this policy, means evidence which is actually available to the prosecutor to be shown in court.
Credible evidence	for the purposes of this policy, means evidence that is capable of belief. The evidence should be considered against other available evidence to determine if it is capable of belief.
Crown Law	means the Crown Law Office which: <ul style="list-style-type: none"> • provides legal advice and representation services to the government in matters affecting the executive government, and • administers the prosecution process in the criminal justice system, in particular, Crown prosecutions.
Crown prosecutions	means all category 4 offences (the most serious category of offence, for example murder) listed in Schedule 1 of the Criminal Procedure Act 2011, High Court proceedings, jury trials and other proceedings where the Solicitor-General directs that it is appropriate for the proceeding to be treated as a Crown prosecution.



Crown Solicitor	means private legal practitioners appointed on the recommendation of the Attorney-General and by warrant of the Governor-General, and includes other staff within their office.
Defendant	means a person against whom an action or claim is brought in a court of law.
Event	means: <ul style="list-style-type: none"> • an accident, incident, mishap, or potential accident, incident or mishap, as defined in the MTA, occurring on: <ul style="list-style-type: none"> • New Zealand-flagged commercial vessels in New Zealand waters • New Zealand-flagged commercial vessels offshore • recreational vessels in New Zealand waters • foreign-flagged vessels in New Zealand waters • foreign-flagged vessels offshore in relation New Zealand workers • vessels on demise charter to New Zealand companies in New Zealand waters • ports, and • a notifiable event, incident, injury, or illness, as defined in section 16 of HSWA, associated with work undertaken on a vessel or at a designated port.
Evidential Sufficiency Test	means the prosecutor should be satisfied there is sufficient evidence to prosecute on the basis that there is a reasonable prospect of conviction.
In-house	for the purposes of this policy, means the prosecution is conducted internally by a Maritime NZ Solicitor.
Judicial review	for the purposes of this policy, means a judge is asked by a person affected by the decision to review a decision made or action taken under a legal power. The judge does not make a decision on whether the decision or action being reviewed was the 'right decision', but looks at whether the decision was made in line with the law.



Manifestly inadequate	for the purposes of this policy, means a situation where something is obviously insufficient, lacking the necessary quality, or undermines public confidence in the justice system.
Maritime domain	for the purposes of this policy, refers to maritime activities related to maritime commercial operators, maritime security for ports and shipping, recreational boating, and national and Pacific search and rescue coordination within New Zealand's marine waters.
Material change in circumstances	for the purposes of this policy, means a significant change that affects a situation or the outcome of a decision. This may be, but is not limited to, a change that was not foreseen or not contemplated in the original decision. This could be a significant change in: <ul style="list-style-type: none"> • circumstances of the defendant, such as insolvency • witness testimony, or • binding case law applicable to the prosecution.
Officer	for the purposes of this policy, in relation to HSWA duties, is defined in detail in section 18 of HSWA, and includes a person occupying a position in relation to the business or undertaking that allows the person to exercise significant influence over the management of the business or undertaking. This is likely to be directors, partners and chief executives.
Officer in charge	for the purposes of this policy, means the lead Maritime NZ investigator in charge of the file.
PCBU	means a person conducting a business or undertaking and is defined in detail in section 17 of HSWA. Most New Zealand businesses, whether large corporates, sole traders, or self-employed, are classed as PCBUs.
Prosecutor	for the purposes of this policy, means any person who makes a prosecution decision or conducts a prosecution, including representing the prosecuting agency in court.
Reliable evidence	for the purposes of this policy, means being satisfied that the evidence can be relied upon as being reliable, including being obtained properly and fairly.



Skipper	for the purposes of this policy, means a person having command of a vessel.
Solicitor-General	means the government's chief legal advisor and advocate in the courts.
Solicitor General's Prosecution Guidelines	means the guidelines provided by the Solicitor General which provide guidance on the conduct of public prosecutions and assist decisions on: <ul style="list-style-type: none"> • whether prosecutions should be commenced • what charges should be filed, and • once criminal proceedings are commenced, how they are conducted and whether they should be continued or discontinued.
Substantively underway	for the purposes of this policy, means we are satisfied that corrective action is being undertaken by the person or PCBU that meets our expectations.
Tightly held operator	for the purposes of this policy, means there are five or fewer shareholding persons who are directly involved in, or close to, the management of the operation. There is little, or no separation of ownership and management of the company.
Worker	for the purposes of this policy, a worker is a person who carries out work in any capacity for a PCBU, including as a subcontractor.

Disclaimer

This document provides information on our prosecution decisions under relevant legislation (including the Maritime Transport Act 1994, Maritime Rules, Marine Protection Rules, and the Health and Safety at Work Act 2015 and its relevant Regulations). This document is not a substitute for the rules and legislation.

Operators, PCBU's, and others must make sure they are operating to maritime, health and safety, and other legislation. Legal advice should be obtained where appropriate. This document may not be the most current version available so please check the operational policy page on maritimenz.govt.nz to confirm that you are referring to the current version of this publication.